

**Aquilla v Villa**

2020 NY Slip Op 35748(U)

October 2, 2020

Supreme Court, Westchester County

Docket Number: Index No. 58739/2019

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeal of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp \_\_\_\_ Dec x Seq. Nos. 1-2 Type SJ

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**

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MIGUEL AUQUILLA and HILDA GUZMAN,

Index No. 58739/2019

Plaintiffs,

-against-

DECISION AND ORDER

GLADYS VILLA; DEUTSCHE BANK NATIONAL  
TRUST COMPANY as Trustee for the  
ARGENT SECURITIES INC. ASSET-BACKED  
PASS-THROUGH CERTIFICATES, SERIES  
2005-W4, et al.,

Defendants.

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The following papers numbered 1 to 6 were read on these motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affidavit, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Memorandum of Law	3
Affirmation and Exhibits in Reply	4
Reply Affidavit, Affirmation and Exhibits	5
Reply Memorandum of Law	6

The Court has before it two motions in this action, the second before this Court involving these parties and this property, 56 Dale Avenue, Ossining. In the previous action, Index No. 70476/2016, the Court conferenced the case extensively in an attempt to resolve it. Because of the unusual situation -

Mr. Auquilla and Ms. Guzman own the property, but Ms. Villa is the sole mortgagor - the Court was unable to do so. In a Decision and Order dated April 17, 2017, the Court denied summary judgment and the appointment of a referee to Deutsche Bank National Trust Company (the "Bank"), without prejudice. It also held that Mr. Auquilla and Ms. Guzman were awarded sole title to the property,<sup>1</sup> to the exclusion of Ms. Villa. Although the Court eventually did grant summary judgment to the Bank, it nonetheless dismissed the action (without prejudice) because of the Bank's repeated failures to comply with the Court's directives.

The first motion is filed by plaintiffs. It seeks summary judgment (1) cancelling and discharging "the Argent Mortgage (as was recorded in the Office of the Westchester County Clerk on or about October 18, 2005 under control number 452780310)" (the "Mortgage") and declaring the Mortgage to be unenforceable; (2) declaring that plaintiffs hold absolute sole legal title to the premises free and clear of any mortgage, estate, encumbrance, trust or other interest of the Bank; (3) declaring that the Bank is barred from asserting any claims to an estate, encumbrance, trust or other interest to the property; (4) granting temporary, preliminary, and permanent injunctive relief enjoining the Bank

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<sup>1</sup>The Bank takes issue with plaintiffs' assertions that they own the premises; it states that plaintiffs do not have "constructive possession of the Property." If this were true, the only reason would be because plaintiffs have **actual possession** of the property. As the Court found in 2017, plaintiffs are the sole title holders to the property. It is plaintiffs' home, and they are the only ones doing all of the maintenance for the house and its grounds.

from interfering in any way with plaintiffs' title to or possession of the property; (5) directing the Clerk to, upon payment of proper fees, cancel and discharge the Mortgage; and, (6) directing the Clerk to, upon payment of proper fees, cancel and discharge the two Notices of Pendency as liens against the premises. Plaintiffs also seek to dismiss with prejudice the Bank's counterclaims and affirmative defenses or, in the alternative, pursuant to CPLR § 603, sever any such claims which are deemed legally viable. Plaintiffs also seek a default judgment against Ms. Villa and an order directing her to execute a Quit Claim deed for the premises (and any requisite documents); or, alternatively, should Ms. Villa refuse or be otherwise unavailable or unable to execute a Quit Claim deed, an order stating that the title of the premises is exclusively held by plaintiffs as joint tenants with the right of survivorship. Plaintiffs further seek an order directing Ms. Villa to provide satisfactions of the judgments and liens set forth in their complaint; or, alternatively, should she refuse or otherwise be unavailable or unable to do so, a money judgment in favor of plaintiffs against her in such sum as is determined upon inquest to be sufficient to pay off and satisfy the judgments and liens as set forth in the complaint. Finally, plaintiffs also seek sanctions against the Bank for frivolous litigation.

The Bank's motion seeks summary judgment on its counterclaims and a default judgment against Ms. Villa on its cross-claims.

The Court begins with the motions for defaults against Ms. Villa. Plaintiffs served their summons and complaint against her personally. When they received no answer or any other response, they sent a second copy of the pleadings to Ms. Villa. Plaintiffs also served Ms. Villa with their motion for summary judgment. Yet despite their repeated attempts to obtain her participation in this action, Ms. Villa defaulted. The Court thus grants plaintiffs' motion for a default judgment against Ms. Villa. Given Ms. Villa's longstanding refusal to participate in the litigations concerning the property, and the fact that the Court already declared plaintiffs to be the sole titleholders to the property, the Court hereby directs counsel for plaintiffs to execute, in Ms. Villa's stead and on her behalf, any documents necessary to ensure that the title of the premises is exclusively held by plaintiffs as joint tenants with the right of survivorship.

With respect to plaintiffs' request for Ms. Villa to provide satisfactions of the judgments and liens set forth in their complaint, or, alternatively, a money judgment, the Court finds that an inquest is necessary to determine the amount of the money judgment. Plaintiffs shall contact this Court's Part Clerk to schedule the inquest.

The Court denies the Bank's request for a default judgment against Ms. Villa. The Bank did not serve her with their answer and cross-claims properly. Although it is a pleading, they served her by mail only; CPLR § 3012(a) requires personal service on any party who has not appeared, which Ms. Villa has not. The pleading also failed to direct her to answer the cross-claims. The Bank seeks to remedy this error in its reply papers. This is improper on multiple levels, none of which warrant discussion. The Bank's request for a default against Ms. Villa is denied. The cross-claims against her are dismissed, without prejudice.

The Court turns next to the issue of the Mortgage. It is undisputed that plaintiffs are not parties thereto. The Note and Mortgage are solely between the Bank's predecessor and Ms. Villa. It is also undisputed that Ms. Villa defaulted on the Mortgage in December 2009. According to the Bank's statement of facts, the Bank's predecessor commenced its first foreclosure action in October 2010 against Ms. Villa. The Court dismissed that action in February 2013 for the Bank's failure to prosecute the action. In December 2014, the Bank commenced a second foreclosure action against Ms. Villa and plaintiffs. This action, referenced above, was before this Court. This Court dismissed that action, without prejudice, in December 2018 because the Bank failed to comply with previous Court orders. The Bank did not appeal that Decision and Order. Nor did the Bank commence a new foreclosure action.

Plaintiffs contend that the Bank cannot seek to enforce the Mortgage against the premises because it is time-barred by the six-year statute of limitations. As a result, they seek to cancel the mortgage pursuant to RPAPL § 1501(4). This statute provides that when a statute of limitations for a foreclosure action has expired, parties such as plaintiffs herein "may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom." The sole exception is that "no such action shall be maintainable in any case where the mortgage . . . shall be in possession of the affected real property at the time of the commencement of the action." The statute makes it clear that "In any action brought under this section it shall be immaterial whether the debt upon which the mortgage or lien was based has, or has not, been paid; and also whether the mortgage in question was, or was not, given to secure a part of the purchase price."

Plaintiffs assert that the six-year statute of limitations for the Bank to commence a third foreclosure action expired in 2016 because the Bank accelerated the mortgage debt in 2010, when it commenced its first foreclosure action. *Kashipour v. Wilmington Sav. Fund Soc'y, FSB*, 144 A.D.3d 985, 986, 41 N.Y.S.3d 738, 739 (2d Dept. 2016) ("once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to

run on the entire debt." ). They argue that § 1501(4) squarely applies here to warrant expunging the Mortgage.

The Bank does not dispute that it accelerated the debt in 2010. Instead, it claims that the statute of limitations does not apply because the sole exception, quoted above, applies. It claims that it is "in possession of the affected real property," as a "mortgagee in possession," and that as a result, there is no statute of limitations on commencing a foreclosure action. See *LaPlaca v. Schell*, 68 A.D.3d 1478, 1479, 892 N.Y.S.2d 244, 245 (3d Dept. 2009) ("the statute of limitations will not run against a mortgagee in possession, the theory being that the mortgagor's acquiescence to that possession is a continuing acknowledgment of the debt."). The Bank claims that it is a mortgagee in possession because of its payment of taxes and doing property inspections, based on alleged documentary evidence: documents called "Work Order History and Property Inspection Reports," as well as "Payment Histories" and "Escrow Payment History."

The Court examines these assertions in reverse order. First, none of the exhibits that the Bank submits to the Court qualifies as "documentary evidence." It is well-settled that "to be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity." *Fontanetta v. Doe*, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569, 575 (2d Dept. 2010). As the Second Department has explained, "documentary evidence" "must be 'unambiguous, authentic, and undeniable.'" It is clear that judicial records,

as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case. Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence." *25-01 Newkirk Ave., LLC v. Everest Nat. Ins. Co.*, 127 A.D.3d 850, 851, 7 N.Y.S.3d 325, 326 (2d Dept. 2015).

In this case, none of the purported documentary evidence submitted by the Bank qualifies as "essentially undeniable." Rather, these exhibits are summaries prepared by the Bank, without any supporting documentation (such as tax bills, cashed checks, etc.). These documents are far from "essentially undeniable."

Even if these documents were evidentiary - which they are not - the Court would still have to reject the Bank's position. This is because, assuming that the Court were to credit the Bank's assertions, the Bank **still** does not meet the definition of a mortgagee in possession, according to the cases that the Bank itself cites. For example, a plaintiff was found to be a mortgagee in possession when he "demonstrated consistent possession of one half of the subject property through his actual occupancy for several years, the time he spent making improvements, his use for storage related to his business and by renting it to others." *LaPlaca v. Schell*, 68 A.D.3d 1478, 1479,

892 N.Y.S.2d 244, 245 (3d Dept. 2009). See also *Becker v. Eddy*, 149 A.D. 211, 212, 133 N.Y.S. 771, 772 (2d Dept. 1912), *aff'd sub nom. Becker v. McCrea*, 214 N.Y. 632 (1915) ("Mrs. Eddy took possession of the property, and she and her devisees . . . have ever since occupied it, cultivating the land, raising and using the crops, and building a barn for use upon the premises."). Those cases are entirely distinguishable from the facts in this action.

In another case cited by the Bank, an unreported<sup>2</sup> December 2017 Decision and Order from Justice Wood, Supreme Court, Westchester County, *Mardenborough v. U.S. Bank*, Index No. 52290/2016, the facts differ radically from those in this action. In *Mardenborough*, the Court held that the bank was a mortgagee in possession because of a number of factors that the Bank here does not even allege. In that case, the bank made "significant repairs and improvement of the mortgage [sic] premises, has undertaken extensive efforts to protect and preserve it and has exclusively maintained it." Specifically, the bank's work included "installing locks to the door and other areas; removing debris and garbage; removing hazardous waste, remediating hazardous conditions in the interior of the mortgage premises; claiming and clearing the mortgage premises, cleaning and mediation from a pest infestation; cleaning the gutters,

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<sup>2</sup>The Bank failed to attach a copy of this Decision and Order to its motion papers. Plaintiffs did so, however, in their opposition.

repairing water damage, regular landscaping; winterizing the plumbing [sic] and other utility systems; regular snow removal; regular inspections of mortgage premises; and provided other services. In addition to the cost of the work commissioned by Lender at the mortgaged premises, Lender has maintained insurance and paid all taxes assessed against it, incurring additional costs of no less than \$187,197.12."

In contrast, it is undisputed that here, the Bank has never taken care of **any** aspect of the exterior or interior of the premises. All of that work is, and has been, done by plaintiffs. The only thing that the Bank alleges that it did is that it paid the taxes and insurance on the property, and did drive-by exterior inspections. The Bank does not even allege that it did "employ the same care and supervision over the mortgaged premises that a reasonably prudent owner would exercise in relation to his or her own property." *Allen v. Echeverria*, 128 A.D.3d 738, 740-41, 11 N.Y.S.3d 170, 173 (2d Dept. 2015). The Court thus finds, as a matter of law, that the Bank is **not** a mortgagee in possession. Because the Bank is not a mortgagee in possession, the statute of limitations did begin to run when it accelerated the debt in 2010. *See Ernst v. Lange*, 190 A.D. 917, 917, 179 N.Y.S. 919 (2d Dept. 1919); *Kashipour v. Wilmington Sav. Fund Soc'y, FSB*, 144 A.D.3d 985, 987, 41 N.Y.S.3d 738, 739 (2d Dept. 2016) ("no foreclosure action was pending at the time the instant

action was commenced, and the mortgage debt had been accelerated and the entire amount was due more than six years prior to the commencement of the instant action.”).

Accordingly, the Court finds that plaintiffs have “established that [they are] the current owner of the subject property, that an acceleration of the full amount of the debt occurred in this instance upon the filing of the summons and complaint in the [2010] foreclosure action . . . and that, accordingly, the statute of limitations expired six years later. . . . Thus, by establishing that the commencement of a new foreclosure action would be time-barred by the applicable six-year statute of limitations,” plaintiffs have demonstrated that they are entitled to relief under RPAPL § 1501(4). *BH 263, LLC v. Bayview Loan Servicing, LLC*, 175 A.D.3d 1375, 1376-77, 109 N.Y.S.3d 142, 144 (2d Dept. 2019). The Court thus grants plaintiffs’ motion to cancel and discharge the Mortgage. It also finds that plaintiffs hold absolute sole legal title to the premises free and clear of any mortgage, estate, encumbrance, trust or other interest of the Bank, and that the Bank is barred from asserting any claims to an estate, encumbrance, trust or other interest to the property. The Court also grants temporary, preliminary, and permanent injunctive relief enjoining the Bank from interfering in any way with plaintiffs’ title to or possession of the property. The Clerk of the Court shall, upon payment of proper fees, cancel and discharge the Mortgage and

the two Notices of Pendency as liens against the premises.

Turning next to plaintiffs' motion to dismiss the Bank's defenses and counterclaims, the Court notes that the counterclaims are for unjust enrichment, equitable lien, quantum meruit, and equitable mortgage. Rather than parse through each of these claims and their elements needlessly, the Court distills these claims into two camps: the Bank's claims to be reimbursed for any taxes, insurance and other expenses that it expended for the property; and the Bank's claims to be reimbursed for the money that it loaned to Ms. Villa. It is undisputed that the Bank did not loan any money to plaintiffs. It has no contractual mortgage relationship with anyone other than Ms. Villa. There is, simply, no legal basis for the Bank to seek reimbursement for the mortgage against plaintiffs. These claims are thus dismissed.

The same is not true, however, for the claims for reimbursement for any expenditures that the Bank made on behalf of the property; to the extent that such expenditures benefitted the property or plaintiffs, the Bank may continue to pursue these claims, subject, of course, to the statute of limitations. The Bank's request for summary judgment on these claims is denied without prejudice.

As for the defenses, the Court dismisses the Bank's defenses of failure to state a claim, lack of standing, wrongdoing, documentary evidence, unclean hands, laches, equitable mortgage,

equitable estoppel, equitable tolling, partial payment and any other defense that seeks to toll the statute of limitations, as none of these has any merit or, frankly, utility at this stage of the proceedings.

The only claims that are left are those against Ms. Villa, to the extent not otherwise denied above, and the claims for reimbursement. The Court denies plaintiffs' motion for sanctions.

All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
October 2, 2020



HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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